

**IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON**

STATE OF WASHINGTON,	)	
	)	DIVISION ONE
Respondent,	)	
	)	No. 55590-1-I
vs.	)	(Linked with
	)	No. 55564-2-I)
BUNTHA EARNG,	)	
	)	<b>UNPUBLISHED OPINION</b>
Appellant.	)	
_____	)	FILED: August 14, 2006

**PER CURIAM** — Buntha Earng appeals his convictions of first degree robbery and first degree burglary while armed with a firearm. He contends that the prosecutor committed prejudicial misconduct in her opening and closing remarks, that the State proved multiple acts of robbery and the trial court failed to give a necessary jury instruction requiring unanimity, and that the court's finding of his criminal history at sentencing violated his right to a jury trial under Blakely v. Washington.<sup>1</sup> To the extent the prosecutor's remarks were improper, Earng has not met his burden of showing prejudice. A unanimity instruction was not required because the robbery was a continuing offense. And Earng's

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<sup>1</sup> 542 U.S. 296, 303, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

sentencing claim fails because criminal history findings are an exception to Blakely. We affirm.

### **FACTS**

Pharat Roeuth invited his friend Nak Ly and an acquaintance, Buntha Earng, to his house to play video games. Earng arrived by himself and told Roeuth that Ly was on his way. After Roeuth invited Earng inside, Earng produced a pistol, racked a round into its firing chamber and held the pistol to Roeuth's head. Earng commanded Roeuth to tell him where he kept his cash, and called another man, unfamiliar to Roeuth, into the apartment. The other man pointed another handgun at Roeuth and Earng went into Roeuth's bedroom and took Roeuth's hidden cash. While Earng was in the bedroom, the other man took jewelry Roeuth was wearing. Earng and the other man left, threatening Roeuth not to involve police. The entire incident took no more than five minutes.

Ly arrived later, and persuaded Roeuth to call police. That evening Roeuth identified San Kouay Saeyang's picture from a photographic montage as the man who had taken his jewelry. Two days later, police located and arrested Earng in a park and Saeyang in the bedroom of a nearby house. Saeyang was sitting on a bed a short distance away from a shotgun and a bag containing three pistols.

Earng was charged with first degree robbery and first degree burglary, each crime alleged to have been committed while armed with a firearm. Saeyang received the same charges. The defendants were tried together.

Before trial, defense counsel jointly moved to exclude any reference to the four firearms found in the bedroom with Saeyang. In response, the prosecutor indicated she did not intend to refer to the shotgun, but argued the handguns were relevant in light of the handguns used in the robbery. After discussing a procedure for Roeth to view the pistols, the court denied the defense motion.

In her opening statement, the prosecutor referred to the shotgun and the three handguns. Neither defense counsel objected, but both counsel later jointly moved for a mistrial based on the mention of the shotgun. The court denied the mistrial, noting the jury would receive the standard instruction to disregard unsupported argument, and offered to give an additional specific curative instruction. Counsel for each defendant declined. The shotgun was not mentioned again during the trial in evidence or argument.

The State presented evidence of the entire encounter between Roeth and the defendants and did not elect to rely on any specific part of the incident to prove the charges. No counsel proposed an instruction requiring the jury to be unanimous about any particular act by either of the codefendants that constituted the robbery, and the court gave no such instruction. In addition to identifying each defendant, Roeth identified one of the three recovered handguns as very similar to the gun Earng used in the robbery.

In closing argument, the prosecutor challenged the credibility of Earng's alibi witness because he surfaced only just before trial, months after police

arrested Earng. Defense counsel objected when the prosecutor said that if her close friend were in jail, she would get the attention of a police officer to let him or her know her friend was unjustly arrested. The trial court overruled the defense objection to this argument but later sustained Earng's counsel's objection that a gun was pointed at his client. The jury rejected Earng's alibi defense and Saeyang's misidentification defense and found both men guilty.

At sentencing, Earng submitted a written memorandum agreeing with the State's calculation of his standard range based on his criminal history. The court sentenced Earng to a standard range sentence. Earng appeals.

### **Prosecutorial Misconduct**

Earng argues the prosecutor committed misconduct in her opening statement and closing argument. When prosecutorial misconduct is alleged, the defendant bears the burden of establishing that the conduct complained of was both improper and prejudicial.<sup>2</sup> Allegedly improper statements must be viewed in the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions.<sup>3</sup> Even if a defendant proves that conduct by the prosecutor was improper, the misconduct will not constitute prejudicial error unless the appellate court determines there is a substantial likelihood that the misconduct affected the jury's verdict.<sup>4</sup>

Earng first contends that the prosecutor's improper reference to the

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<sup>2</sup> State v. Stenson, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997).

<sup>3</sup> State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997).

<sup>4</sup> State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995).

shotgun in her opening statement constituted misconduct so egregious that the trial court erred by declining to grant his motion for a mistrial. We disagree.

The decision to deny a request for mistrial based upon prosecutorial misconduct lies within the sound discretion of the trial court; an appellate court determines only whether the misconduct, when viewed against the backdrop of all the evidence, so prejudiced the defendant that nothing short of a new trial could insure that the defendant will be tried fairly.<sup>5</sup> When, as here, the court instructs the jury to disregard statements of counsel that are not supported by the evidence, the jurors are presumed to abide by the instruction.<sup>6</sup>

On this record, Earng has not rebutted the presumption that the jury followed the instruction to disregard the prosecutor's unsupported comment. Earng has not challenged the trial court's admission of the evidence of the three handguns, two of which Roeuth believed were not involved in the robbery. Viewed against this evidentiary background, we cannot conclude the prosecutor's improper but isolated mention of the shotgun was so prejudicial that the trial court abused its discretion by failing to order a mistrial.

Earng also contends he was denied a fair trial by the prosecutor's closing argument. He points to a portion of the prosecutor's argument suggesting his alibi witness, Stephen Hughes, should be considered not credible because he never attempted to tell police they had the wrong man:

And I guess if it were my close friend in jail, accused of a very

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<sup>5</sup> State v. Lewis, 130 Wn. 2d 700, 707, 927 P.2d 235 (1996).

<sup>6</sup> State v. Weber, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983).

serious crime, I guess I'd flag down a patrol car.

....

What I would do is I would pull over, flash my lights, whatever it took to get the attention of that police officer and say: You know what? A very close friend of mine has been arrested, and it's wrong. He was with me. Nothing. Nothing. You resolve the credibility with regard to Mr. Hughes.<sup>[7]</sup>

Earng contends this argument was improper in two ways: first by disclosing that Earng was detained in jail during the trial, and second, by placing the prosecutor's personal opinion before the jury.

As for the first claim, considering the remarks in the context provided by the rest of the prosecutor's argument and her cross-examination of Hughes shows that the reference to jail would have been understood by the jury as a reference to Earng's initial arrest by police. This case thus does not present the type of unsworn inflammatory testimony attacking the presumption of innocence involved in State v. Rivers,<sup>8</sup> cited by Earng. Moreover, even if this isolated reference were taken as a suggestion that Earng was jailed during trial, contrary to Earng's claim, that is not the equivalent to improper shackling before the jury,<sup>9</sup> and here does not establish reversible misconduct.

As for Earng's second contention, argument clearly expressing counsel's personal opinion as to the credibility of a witness is misconduct.<sup>10</sup> Remarks are

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<sup>7</sup> Report of Proceedings (RP) (Nov. 24, 2004) at 358-59.

<sup>8</sup> 96 Wn. App. 672, 674-76, 981 P.2d 16 (1999) (prosecutor's reference to defense witnesses as the "pajama crowd" from the "King County hotel," and defendants as predators, jackals, and hyenas constituted reversible "ill-conceived rhetoric aimed squarely at the jury's passions.")

<sup>9</sup> State v. Mullin-Coston, 115 Wn. App. 679, 693, 64 P.3d 40 (2003), aff'd, 152 Wn.2d 107, 95 P.3d 321 (2004).

not misconduct, however, unless it is clear and unmistakable that counsel is not arguing an inference from the evidence, but is expressing a personal opinion.<sup>11</sup> Here, the prosecutor's argument surrounding the challenged remarks shows her point was that no reasonable person would have acted as Hughes did and therefore the jury should infer he lacked credibility. Thus, while it was unnecessary and dangerous to phrase her argument in terms of what she would have done, and indeed, it would have been more persuasive to continue arguing in terms of what a reasonable person would do, it is not clear and unmistakable that she was impermissibly arguing personal opinion.

We further conclude that even if the remarks were interpreted as personal opinion, Earng has not shown the trial's outcome was likely affected. The crime occurred on July 28. On cross-examination, Hughes conceded he was not certain of the day he recalled being with Earng, either by the date on the calendar, by the day of the week, or even if it was in the month of July or August. Even after defense counsel's strenuous attempts to rehabilitate Hughes on redirect examination, Hughes persisted in testifying that the day he recalled was "[a]pproximately around the 27th or 28th."<sup>12</sup> With this difficulty in his sole witness's testimony, and Ro euth's unequivocal testimony identifying him, Earng has not shown any likelihood the jury would have reached any different result in

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<sup>10</sup> State v. Price, 126 Wn. App. 617, 653, 109 P.3d 27, rev. denied, 155 Wn.2d 1018 (2005).

<sup>11</sup> Price, 126 Wn. App. at 653.

<sup>12</sup> RP (Nov. 23, 2004) at 267.

the absence of the challenged argument.

Earng also points to the incident during the prosecutor's closing argument in which the court sustained defense counsel's objection that "a gun is pointed towards my client."<sup>13</sup> Earng likens this to a Texas case in which a prosecutor pointed a pistol at a defendant in closing argument, pulled the trigger and commented that it would kill "any four time loser" like the defendant, even though there was no evidence of the defendant having prior convictions.<sup>14</sup> The scant record available here does not disclose such egregious misconduct and does not meet Earng's burden of showing prejudice.

Earng alternatively contends that the prejudice from the prosecutor's conduct accumulated to require reversal, even if individual errors did not.<sup>15</sup> The prosecutor's sloppiness in her opening statement, and mishandling of the firearm and unwise reference to herself in closing argument are cause for concern. But in light of Earng's significant difficulty with his alibi defense, which was unaffected by these circumstances, we do not find prejudice requiring reversal.

### **Jury Unanimity**

Earng next argues the trial court erred by failing to give a jury instruction requiring jury unanimity as to whether Earng's act of taking cash or Saeyang's act of taking jewelry established the basis for the first degree robbery charge.

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<sup>13</sup> RP (Nov. 24, 2004) at 361.

<sup>14</sup> Joyner v. State, 436 S.W.2d 141, 142 (Tex. Crim. App. 1968).

<sup>15</sup> In re Personal Restraint of Lord, 123 Wn.2d 296, 332, 868 P.2d 835 (1994).



Earng may raise this issue for the first time on appeal because the failure to give a required unanimity instruction raises an issue of constitutional magnitude.<sup>16</sup>

A jury unanimity instruction is required where the evidence indicates several distinct criminal acts have been committed, but the defendant is charged with only one count of criminal conduct and the State fails to elect to rely on a specific act.<sup>17</sup> A unanimity instruction is not required, however, where the defendant's acts form a continuing course of criminal conduct.<sup>18</sup> The court evaluates a defendant's acts in a commonsense manner to determine whether they form one continuing offense.<sup>19</sup> Important factors to consider are whether the conduct occurred at different times and places or against different victims.<sup>20</sup>

Where criminal conduct occurs within a short time frame, a commonsense approach suggests that the continuing offense exception applies.<sup>21</sup> Likewise, evidence that a defendant engaged in a series of acts intended to secure the same objective supports a finding that the defendant's conduct was a continuing course of conduct rather than several distinct acts.<sup>22</sup>

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<sup>16</sup> State v. Camarillo, 115 Wn.2d 60, 63 n. 4, 794 P.2d 850 (1990).

<sup>17</sup> State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984).

<sup>18</sup> State v. Crane, 116 Wn.2d 315, 330, 804 P.2d 10 (1991).

<sup>19</sup> Petrich, 101 Wn.2d at 571.

<sup>20</sup> Petrich, 101 Wn.2d at 571.

<sup>21</sup> See, e.g., Crane, 116 Wn.2d at 330 (a series of assaults resulting in fatal injuries occurring over a two-hour period constituted a continuous course of conduct).

<sup>22</sup> See State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989) (forcefully kissing and hitting the victim constituted a continuous offense because both were aimed at the single purpose of having sex with her).

Viewed in a commonsense manner, the facts of this case clearly presented a continuing offense. The victim was the same, the critical acts of taking Roeuth's property by threat of force occurred virtually simultaneously, and the evidence strongly suggests the codefendants shared the joint objective of stealing Roeuth's property by threatening him with handguns. Moreover, a jury "need not reach unanimity on whether a defendant acted as a principal or an accomplice."<sup>23</sup> A Petrich instruction was not required and Earng's right to a unanimous jury was not violated. Accordingly, we do not address the State's alternative argument that any error was harmless beyond a reasonable doubt.

### **Sentencing Under Blakely**

Finally, Earng's sentencing claims fail because Blakely by its own terms applies only to factual findings "[o]ther than the fact of a prior conviction."<sup>24</sup>

Affirmed.

FOR THE COURT:

s/ Baker, J.

s/ Appelwick, C.J.

s/ Schindler,

A.C.J.

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<sup>23</sup> State v. Teal, 152 Wn.2d 333, 339, 96 P.3d 974 (2004).

<sup>24</sup> Blakely, 542 U.S. at 301.